(2)

NO. 89-1807

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1990

RONALD E. BROWN,

Petitioner,

vs.

THE CITY OF SEATTLE,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO REVIEW A DECISION FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MARK H. SIDRAN
City Attorney

MICHAEL J. FINKLE,
Assistant City Prosecutor
Counsel of Record
with Michael W. Brown,
Frances P. Wagner,
Charlotte E. Clark-Mahoney
Assitant City Prosecutors

Seattle City Attorney
710 Second Avenue, Suite 1414
Seattle, Washington 98104
Telephone: (206) 684-7757

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I. COUNTERSTATEMENT OF THE CASE.

The defendant in this case was charged with and convicted of driving while under the influence of intoxicants or drugs. The charges were initiated after he drove onto a curb and smashed his car into a guard rail, and another car. He made several motions before trial including a motion to suppress statements and for particular discovery. The defendant's motion to suppress was based upon an alleged violation of the right to counsel, when the officers allegedly interrogated the defendant after he asked to speak to his lawyer. The discovery motion to dismiss was based upon a request from counsel for all of the records in the City Engineering Department relating to the intersection where the accident took place. The de-

fendant was retried after a hung verdict and convicted.

The defendant appealed from the Seattle Municipal Court, a court of limited jurisdiction, to the Superior Court of King County. The Rules of Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) provide that an appellant must provide a written transcript of the portions of the tape-recorded record in the trial court which are pertinent to the appeal. RALJ 6.3A.[1]

The defendant prepared and filed a partial transcript that included only those portions of the trial court record relating to the discovery motions. The Superior Court ruled that the record was insufficient to decide any of appellant's

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[1]The appendices referred to have been lodged, by separate cover, with the Clerk of Court.

issues other than the discovery issue. At argument on the appeal, the Court denied an oral motion to supplement the record. Decision on RALJ appeal, Appendix A at 10. When the defendant filed a motion to reconsider in the Superior Court, he included a transcript of the motion to suppress statements based upon the defendant's request for a lawyer. The motion for reconsideration was denied and the defendant's failure to perfect the record on appeal remained as the reason the Washington Appellate Courts could not decide the counsel issue on its merits.

The circumstances surrounding the motion for discovery are reflected in the transcripts Appendix B. On April 13 and 14, defense counsel executed two subpoenas duces tecum without judicial

approval. Appendix C at 1-4. On May 4, 1988, at a pretrial hearing, defense counsel made motions to depose the police officer, "witnesses," and city engineers. The motions were denied because the defense attorney had not attempted to contact the witnesses. The Court asked that the defense attempt to obtain the information. Appendix B at 2. Defense counsel made no subsequent attempt to seek the information on her own as the Court requested.

A motions hearing was held on May 19, 1988, 2:30 p.m., Seattle Municipal Court, Department 2, before Judge Pro Tem David Laidman. Defense counsel raised no discovery issues at this hearing. Also on May 19, 1988, defense counsel went to another department and had Judge Pro Tem Mary E. Ramey sign a subpoena duces tecum

and notice of deposition, ex parte, to depose the same witnesses as listed in the order on pre-trial hearing form. Appendix C at 7-8.

The subpoena duces tecum was not stamped "received" by anyone. The subpoena duces tecum was captioned "In The Superior Court For The State Of Washington For King County." Id. The deposition was scheduled for May 27, 1988, at 10:00 a.m. Id.

On June 3,1988, Judge Kessler ordered the City to comply with the discovery request by June 8, 1988. Appendix B at 49-50.

The City Attorney's Office spent three days contacting the Engineering Department and gathered all the relevant information in the Engineering Department, including a list of all the accidents at

the location, the dates and the description of signs existing at that location. This information was provided to the defense attorney on June 8, 1988. Appendix B at 52-53. On June 17, 1988, defendant moved to dismiss, arguing that discovery was incomplete. Defense counsel had not contacted the City Attorney's Office between June 8 and June 17. The motion was denied. Id. at 55-56.

On August 11, 1988, defendant again moved to dismiss. The transcript of that hearing shows the City's efforts to comply. Appendix B at 59-67. The prosecutor called Mr. Thordason from City Engineering and told him to cooperate with defense counsel when she called, to comply with her requests and to give her whatever information she requested. Id. at 61. The prosecutor offered to go with

defense counsel in person to the Engineering Department to get the requested materials. Id. at 60-61. On August 11, 1988, the prosecutor offered to go with defense counsel that very minute to the Engineering Department. Defense counsel declined. Id. at 66-67.

The inadequate record on appeal provided by appellant prevents the City from submitting any further counterstatement of the facts and procedure.

II. ARGUMENT WHY CERTIORARI SHOULD BE DENIED.

A. The Washington Appellate Courts Did Not Err In Denying Review Of An Issue With No Record.

1. The Defendant's Failure To Provide An Adequate Record On Appeal Precludes Review.

In Washington, the defendant, as appellant, was required to transcribe the lower court proceedings that

were "necessary to present the issues raised." RALJ 6.3A(c). RALJ 6.3A(a) provides:

> Unless the superior court orders otherwise, the appellant shall transcribe the electronic recording of proceedings as provided in section (C) of this rule. The transcript shall be filed and served with the appellant's brief.

The party seeking review of a lower court decision has the burden of perfecting the record on appeal so that the reviewing court has before it all of the evidence relevant to the issue raised. *State v. Rienks*, 46 Wn.App. 537, 731 P.2d 1116 (1987); *State v. Garcia*, 45 Wn.App. 132, 140, 724 P.2d 412 (1987); *State v. Jackson*, 36 Wn.App. 510, 676 P.2d 517, *aff'd*. 102 Wn.2d 689, 689 P.2d 076 (1984). Without a complete appellate transcript it is not possible to review the lower court proceedings to determine

whether prejudicial error occurred. *Seattle v. Boulanger*, 37 Wn.App. 357, 688 P.2d 67 (1984). The Washington Supreme Court and Court of Appeals have consistently refused to decide issues in cases where an inadequate record has been provided for review. See, *e.g.*, *State v. Blight*, 89 Wn.2d 38, 569 P.2d 1129 (1977); *Seattle v. Boulanger, supra*; *State v. Murphy*, 35 Wn.App. 658, 669 P.2d 1129 (1987). In *State v. Allen*, 88 Wn.2d 394, 562 P.2d 632 (1977), the Washington Supreme Court denied review of the appellant's challenge to the sufficiency of the evidence leading to his criminal conviction because the transcript on appeal failed to contain a record of the facts presented at trial. Similarly, in *State v. Blight, supra*, the Supreme Court refused to hear the defendant's assignment

of error which required a review of the facts because no report of proceedings had been filed by the defendant.

The defendant listed three assignments of error for discretionary review. All of the issues required completed transcription of the trial court proceedings in order for the issues to be resolved. Without a transcript of his arraignment, pretrial hearing and trial, the appellate courts were unable to decide these issues. Therefore, this Court should be limited to the issue concerning the discovery violation since that was the only issue resolved by the Superior Court, and considered by the Court of Appeals, and the Supreme Court of Washington.

2. Any Alleged Violation Of The Right To Counsel Does Not Warrant Review.

The defendant filed a motion to reconsider the court's decision in the Superior Court, which was the first appellate review of this case. In that motion the defendant appended a partial transcript of a hearing regarding the motion to suppress statements. The Superior Court had previously rejected a motion to supplement the record with that transcript, RALJ decision, Appendix A-10. However, the transcript of the May 19, 1988 hearing, Appendix B at 3-46, reveals another sound basis for this Court to deny review.

The transcript reflects that after arrest, the defendant asserted his right to counsel and to remain silent. The officers waited some time then requested

the defendant to submit to a breath-testing devise. After admonishments as to the repercussions of refusal, the defendant refused to take the test and then responded to questions by the officers, without counsel present and without new *Miranda* warnings. Defendant asserts these statements were admitted at trial.

Similar fact patterns have been reviewed and decided upon by this court. See, *e.g.*, *Connecticut v. Barret*, 479 U.S. 523, 93 L.Ed.2d 920, 1075 S.Ct. 828 (1987); *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L.Ed.2d 405, 103 S.Ct. 2830 (1983); *Wyrick v. Fields*, 459 U.S. 42, 74 L.Ed.2d 214, 103 S.Ct. 394 (1982); *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378 101 S.Ct. 1880 (1981), *rehearing denied*, 452 U.S. 973, 69 L.Ed.2d 984, 101 S.Ct. 2138. The facts

in this case do not present a novel pattern that would advance or clarify present federal case law.

This is particularly true considering the disjointed and confusing state of the record presented for review. The additional transcript submitted regarding the motion to suppress does not contain the findings, conclusions or rulings of the trial court at the hearing. Neither has counsel filed or otherwise presented a transcript of the trial court wherein these statements were allegedly admitted into evidence. Certiorari should be denied because the facts surrounding the alleged violation of the right to counsel are neither novel nor clearly presented.

B. The Trial Court Did Not Err By Denying Defendant's Motion To Dismiss Based On An Alleged Discovery Violation.

1. The discovery evidence was not material.

The scope of discovery and the granting or denial of sanctions for failure to comply with discovery requests are matters within the sound discretion of the trial court, *United States v. Williams*, 791 F.2d 1383 (9th Cit. 1986); *State v. Tyler*, 77 Wn.2d 726, 736, 466 P.2d 120 (1970); *State v. Lauterback*, 33 Wn.App. 161, 168, 653 P.2d 1320 (1982), *rev. denied*, 98 Wn.2d 1013 (1983), reviewable only for manifest abuse of discretion. *State v. Krausse*, 10 Wn.All. 574, 576, 519 P.2d 266 (1974); *State v. Laureano*, 101 Wn.2d 745, 762 682 P.2d 889 (1984). Nevertheless, dismissal of charges remains an extraordinary remedy, *State v. Baker*, 78 Wn.2d 327, 332, 474 P.2d 254 (1970), and is appropriate only if lesser sanctions would not give the

defendant a fair trial. *State v. Whitney*, 96 Wn.2d 578, 580, 627 P.2d 956 (1981); *State v. James*, 26 Wn.App. 522, 524, 614 P.2d 207 (1980). To support a dismissal within this discretionary power conferred upon the trial court, the record must show governmental misconduct or arbitrary action together with actual prejudice to the defendant. See, *State v. Bradfield*, 29 Wn.App. 679, 630 P.2d 494 *rev. denied*, 96 Wn.App. 1018 (1981); *State v. Laureano, supra*.

Here, the record fails to show any prejudice to the defendant or any governmental misconduct by the City. The purpose of discovery is to protect against surprise, allowing the defendant to anticipate the prosecutor's arguments and prepare an adequate defense. *State v. Brush*, 32 Wn.App. 445, 455, 648 P.2d 897

(1982), *rev. denied*, 98 Wn.2d 1017 (1983). It cannot be contended here that the defendant would be unfairly surprised by the City's evidentiary presentation.

The applicable criminal discovery rules in the instant case are Seattle Municipal Court Local Rule (SMCLR) 4.7 and Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 4.7.

SMCLR 4.7 requires that the plaintiff mail discovery to the defendant after defendant has requested the discovery accompanied by a self-addressed stamped envelope. Failure to provide this discovery "shall result in a motion to compel or terms." It does not contemplate dismissal.

The discovery provisions of CrRLJ 4.7 require the prosecution to disclose any material or information within his know-

ledge which tends to negate defendant's guilt. CrRLJ 4.7(3). In conclusion, the rule states:

> The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession or control of members of his or her staff. CrRLJ 4.7(4)

CrRLJ 4.7(d) addresses materials held by others.

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Applying the rules to the facts of this case, it is apparent that the three

judges below did not err by refusing to dismiss the case.

There was no showing that any of the undisclosed information was material. The undisclosed information was of minimal value to the defendant, therefore, the failure to disclose did not cause substantial prejudice to defendant.

Reversal for non-compliance with CrRLJ 4.7 arises from an abuse of discretion by the trial court or some substantial injury to defendant. *State v. Vavra*, 33 Wn.App. 142, 144, 652 P.2d 959 (1982). (Citation omitted.) There was no showing that the evidence, if made available, might exculpate the accused as required by *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Further, a conviction need not be set aside unless the prosecution has failed

to disclose evidence which is of sufficient significance to amount to a denial of the right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976):

> If the omitted evidence creates a reasonable doubt that did not otherwise exist constitutional error has been committed ... The omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

State v. Ervin, 22 Wn.App. 898, 905, 594 P.2d 934 (1979).

The entire record cannot be evaluated here because of appellant's failure to properly transcribe the trial court proceedings. Nonetheless, the omitted evidence would not have created a reasonable doubt that did not otherwise exist because the information about accidents at the same location was neither material

nor relevant. The elements of the crime of DWI do not include bad driving, therefore, evidence of other accidents is not material. Further, evidence of the conditions of the street, lighting and factual information of other accidents at the location would not be relevant or connected to the defendant's driving onto a curb and into a guard rail.

Because the accident-related evidence sought by defendant was neither material nor otherwise admissible, this is not an issue that should be reviewed.

2. <u>There was no prosecutorial misconduct regarding discovery of evidence</u>.

The chronology of events regarding discovery reveals that the three judges in the trial court who denied defendant's motions to dismiss ruled correctly. On March 28, 1988, de-

fendant filed a Notice of Appearance, Demand for Jury Trial and Demand for Discovery. Defendant's arraignment was set for March 30, 1988, 9:00 a.m. Seattle Municipal Court, Department 1.

On April 14 and 15, 1988, defense counsel executed two subpoenas duces tecum without judicial approval which is required by CrRLJ 4.6(a). Appendix C at 1-4. As a result, the subpoenas duces tecum were without legal significance. On May 4, 1988, a pretrial hearing was held. Defense counsel made motions to depose the police officers, "witnesses" (whomever they might be) and City engineers. The motions were denied because defense counsel had not attempted to contact the witnesses first. See, Appendix C, trial court's notations in margins of pre-trial order, at 6. The trial court

noted that all accident reports, complaints, and repairs to the street at or near the intersection where the accident occurred were available at the City Engineering Office. The judge told defendant to go get the discovery himself which is permitted under CrRLJ 4.7(4). The materials requested by defendant were not within and the actual knowledge, possession or control of the prosecutor or his staff. Appendix B.

A motions hearing was held on May 19, 1988, 2:30 p.m., at Seattle Municipal Court, Department 2. There is no record that defense counsel made any discovery motions. See, Appendix C, page 1 of court docket at 9. The record does reflect that the defendant went to a different judge on May 19, and had a notice of deposition and subpoena duces tecum

signed by Judge Pro Tem Mary E. Ramey. Appendix C at 7-8. This request was not raised in Department 2, where the prosecutor would have had the case file and familiarity with the case. The subpoena duces tecum was not received by the Seattle City Attorney's Office. The only indication that the subpoena duces tecum was served at all appears in defendant's motion for dismissal and declaration of counsel, attached as Appendix C at 10-14, which states that the subpoena was served on May 25, 1988, on the Mayor's Office and the Law Department. The subpoena, however, does not bear a copy received stamp. The caption on the subpoena duces tecum listed the Superior Court not Municipal Court. The subpoena duces tecum was not served to the proper party. The deposition date, pursuant to

the subpoena duces tecum, was set on May 27, 1988, less than two days after the defendant claims notice of the hearing was served. CrRLJ 4.6(b) requires reasonable written notice of the time and place for taking the deposition. Less than two days notice of a deposition is not reasonable notice. See, Civil Rule (CR) 30(b)(1).

Defendant's first motion to dismiss for the alleged discovery violation was three days after the City received notice of the subpoena duces tecum. On June 3, 1988, Judge Kessler ordered the City to comply with the subpoena duces tecum by June 8, 1988. Appendix B at 50.

The Prosecutor's Office spent three days contacting the Department of Engineering and gathered all the information the Engineering Department had, including

a list of the accidents at that location, the dates, and the description of signs existing at the location. This information was provided to the defense attorney on June 8, 1988. Appendix B at 52. The City had substantially complied with the discovery request.

On June 17, 1988, defense counsel made a second motion to dismiss, arguing that the discovery was incomplete. Defense counsel had not contacted the Prosecutor's Office between June 8 and June 16 to inform them of the alleged inadequacy of the released materials. The defense motion to dismiss was denied. Besides providing defendant with the requested materials on June 8, the prosecutor took the following action attempting to aid the defendant in receiving more discovery.

On July 20, 1988, the prosecutor called Mr. Thordason from Engineering and told him to cooperate with defense counsel when she called, to comply with her request, to give her any information she needed and to call him if there were any problems. Appendix B at 60. He tried to put defense counsel and the Engineering Department people in contact with each other but defense counsel failed to contact the Engineering Department. Id. at 61.

The City offered before trial to go to the Engineering Department personally with defense counsel to get whatever information she felt she was entitled to. Id. at 60-61. Defense counsel was not responsive to this offer. Id. On August 11, 1988, the prosecutor offered to go with defense counsel that very minute to

the Engineering Department and get whatever documents she thought she wanted. Defense counsel apparently rejected this offer also. Id. at 66.

The Prosecutor's Office did all it could to get the defendant the requested discovery. There was simply no violation of the discovery rules. Defendant has not shown that any reasonable person would not have taken the same action that Judges Madsen, Kessler, and Yanick did in denying defendant's motions to dismiss based on alleged discovery violations.

F. CONCLUSION.

Review of this case should be denied. The Superior Court, Court of Appeals, and Washington Supreme Court correctly assessed the merits and record of this appeal. The defendant failed to supply an adequate record for review of

substantive issues and failed to establish the materiality of the discovery requested but allegedly not received. The defendant has not stated any issues or facts that would qualify this case for review and the City urges this court to deny certiorari.

Respectfully submitted this 28th day of August, 1990.

MARK H. SIDRAN
City Attorney

Michael J. Finkle

MICHAEL J. FINKLE,
Washington Bar No. 17911
Assistant City Prosecutor